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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

8 MAURICE VAN THROWER,

9 Petitioner,

10 v.

11 RONALD HAYNES,

12 Respondent.

Case No. C18-1785-RAJ-MAT

ORDER DIRECTING RESPONDENT  
TO FILE SUPPLEMENTAL ANSWER

13  
14 This is a federal habeas action filed under 28 U.S.C. § 2254. Petitioner Maurice Thrower  
15 seeks to challenge in this action his 2013 King County Superior Court convictions on two counts  
16 of child molestation in the first degree. (Dkt. 5.) Respondent filed an answer to the petition on  
17 March 20, 2019 in which he argued that petitioner's federal habeas petition was barred by the  
18 statute of limitations, 28 U.S.C. § 2244(d), and should therefore be denied with prejudice. (Dkt.  
19 13.) Petitioner filed a response to respondent's answer on April 8, 2019 in which he argues that  
20 he is entitled to equitable tolling of the limitations period. (Dkt. 15.) Respondent, in a reply brief  
21 filed on April 11, 2019, concedes that equitable tolling is appropriate in this case and that  
22 petitioner's petition should therefore be deemed timely. (Dkt. 16.)

23 Pursuant to § 2244(d)(1), a one-year period of limitation applies to an application for a writ

ORDER DIRECTING RESPONDENT TO  
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1 of habeas corpus filed by a person in custody pursuant to the judgment of a state court. The one-  
2 year limitation period generally begins to run from the date of the conclusion of direct review or  
3 “the expiration of the time for seeking such [direct] review,” whichever is longer. 28 U.S.C. §  
4 2244(d)(1)(A). The one-year limitation period is tolled for any “properly filed” collateral state  
5 challenge to the state conviction. 28 U.S.C. § 2244(d)(2). The statute of limitations is also subject  
6 to equitable tolling in appropriate cases.<sup>1</sup> *Holland v. Florida*, 560 U.S. 631 (2010).

7 The parties in this case agree that petitioner’s conviction became final on or about March  
8 1, 2016, 90 days after the Washington Supreme Court denied petitioner’s petition for review on  
9 direct appeal. The parties also agree that the statute of limitations then ran for 279 days until  
10 petitioner filed his personal restraint petition in the Washington Court of Appeals on December 6,  
11 2016. Respondent argued in his answer to petitioner’s federal habeas petition that the statute of  
12 limitations was then tolled, in accordance with § 2244(d)(2), until July 10, 2018 when the  
13 Washington Supreme Court Commissioner issued a ruling denying review in petitioner’s personal  
14 restraint proceedings. (*See* Dkt. 13.) Respondent further argued that following issuance of the  
15 Commissioner’s ruling, another 153 days passed before petitioner filed his federal habeas petition  
16 on December 11, 2018, thus rendering the petition untimely because a total of 432 days elapsed  
17 between the date petitioner’s conviction became final and the date he filed his federal habeas  
18 petition.

19 Petitioner, in his response to respondent’s answer, argues that he is entitled to equitable  
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21 <sup>1</sup> In order to receive equitable tolling, a petitioner must show “(1) that he has been pursuing his rights  
22 diligently, and (2) that some extraordinary circumstance stood in his way.” *Pace v. DiGuglielmo*, 544 U.S. 408, 418  
23 (2005). “[T]he requirement that extraordinary circumstances ‘stood in his way’ suggests that an external force must  
cause the untimeliness, rather than, as we have said, merely ‘oversight, miscalculation or negligence on [the  
petitioner’s] part, all of which would preclude application of equitable tolling.’” *Waldron-Ramsey v. Pacholke*, 556  
F.3d 1008, 1011 (9th Cir. 2009) (quoting *Harris v. Carter*, 515 F.3d 1051, 1055 (9th Cir. 2008)).

1 tolling of the limitations period based on events which occurred after July 10, 2018 which were  
2 not reflected in respondent's answer. (*See* Dkt. 15.) Specifically, petitioner maintains that after  
3 receipt of the Commissioner's ruling deny review, he prepared a motion to modify the  
4 Commissioner's ruling and filed it on August 2, 2018 by presenting the document to his prisoner  
5 counselor in accordance with Washington Department of Corrections ("DOC") outgoing legal mail  
6 policies and procedures. (*Id.*) However, SCCC mail services never mailed the motion, a fact  
7 which petitioner claims he did not learn until after receiving respondent's answer to his federal  
8 habeas petition on March 25, 2019. (*Id.*) Petitioner submitted in conjunction with his response  
9 documentation which appears to confirm that petitioner attempted to mail documents to the  
10 Washington Supreme Court on August 2, 2018. (*Id.*, Apps. B, C.)

11 Respondent, in his reply brief, notes that the state court record contains no record of a  
12 motion to modify the Commissioner's ruling and that petitioner's federal habeas petition was  
13 therefore filed outside the statute of limitations because it wasn't received until December 2018.  
14 (*See* Dkt. 16.) Respondent acknowledges, however, that petitioner has now presented proof that  
15 he submitted a timely motion to modify to DOC staff for mailing to the Washington Supreme  
16 Court and that DOC staff failed to mail the motion. (*Id.*) Respondent also concedes that he has  
17 no evidence to rebut petitioner's assertion that he did not know the motion to modify had not been  
18 mailed. (*Id.*) Respondent therefore agrees that under these unique circumstances petitioner should  
19 receive equitable tolling for his federal habeas petition at least until he became aware the state  
20 court proceedings had ended, which would be no later than the date on which the certificate of  
21 finality was issued, October 26, 2018, and that the petition should be deemed timely due to  
22 equitable tolling.

23 This Court has reviewed the state court record submitted by respondent in support of his

1 answer as well as the evidence submitted by petitioner in support of his response to respondent's  
2 answer and concurs with the parties that equitable tolling of the limitations period until at least  
3 October 26, 2018 is warranted. This renders petitioner's federal habeas petition timely and, thus,  
4 it is appropriate now to do as respondent requests and permit him to file a supplemental answer  
5 addressing petitioners' petition.

6 Based on the foregoing, the Court hereby ORDERS as follows:

7 (1) Respondent's original answer (Dkt. 13) is STRICKEN from the Court's motion  
8 calendar.

9 (2) Respondent shall file a supplemental answer addressing petitioner's federal habeas  
10 petition not later than *thirty (30) days* from the date on which this Order is filed. As a part of such  
11 answer, respondent shall state whether petitioner has exhausted available state remedies and  
12 whether an evidentiary hearing is necessary. The answer will be treated in accordance with LCR  
13 7(d)(3). Accordingly, on the face of the answer, respondent shall note it for consideration on the  
14 fourth Friday after filing. Petitioner may file and serve a response not later than the Monday  
15 immediately preceding the Friday designated for consideration of the matter, and respondent may  
16 file and serve a reply not later than the Friday designated for consideration of the matter.

17 (3) The Clerk shall send copies of this Order to petitioner, to counsel for respondent,  
18 and to the Honorable Richard A. Jones.

19 DATED this 11th day of June, 2019.

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22 Mary Alice Theiler  
23 United States Magistrate Judge